

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIAM J. HANRAHAN III
Claimant

VS.

U.S.D. 437

Respondent

AND

KANSAS ASSOC. OF SCHOOL BOARDS
Insurance Carrier

Docket No. 1,017,344

ORDER

Respondent and its insurance carrier appealed the August 24, 2004 preliminary hearing Order for compensation entered by Administrative Law Judge (ALJ) Brad E. Avery.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas appeared for respondent and its insurance carrier (respondent)

RECORD AND STIPULATIONS

In its brief to the Appeals Board (Board) respondent lists the record on appeal as follows:

- A. Claimant's Exhibit 1: Accident Report
- B. Claimant's Exhibit 2: St. Francis Medical Records
- C. Claimant's Exhibit 3: Stormont-Vail Medical Records

- D. Claimant's Exhibit 4: Stormont-Vail Medical Records
- E. Claimant's Exhibit 5: KU Medical Records
- F. Claimant's Exhibit 6: St. Francis Medical Records
- G. Claimant's August 23, 2004 fax [sic] of Dr. Holmes' Medical Report¹

But respondent objects to the Board considering Dr. Holmes report:

Initially, [r]espondent argues that such evidence should not be admitted on the record as [r]espondent was not entitled to review the document prior to the preliminary hearing in order to rebut such evidence, and [r]espondent was not entitled to review the letter prior to it being faxed on to Judge Avery. Thus, the evidence stood for itself and no cross-examination of the report could have taken place at the preliminary hearing.²

In claimant's brief there is no reply to respondent's objection to the admission of Dr. Holmes' report. Dr. Holmes report was not offered nor admitted as an exhibit at the preliminary hearing. Instead, it was apparently received by claimant's counsel after the hearing and then forwarded on to the ALJ. However, there was some discussion concerning an anticipated report from Dr. Holmes at the end of the August 19, 2004 preliminary hearing.

Ms. Fisher: We have requested a causation letter from Dr. Holmes. We were supposed to get it yesterday, we were supposed to get it two days ago. I don't know if that will help you with your decision. They tell us every day that it's going to be faxed.

Mr. Andersen: Certainly I wouldn't agree with that because I would like to see what Dr. Holmes is going to say and also the basis for his opinions in this case and I think the Court needs to carefully review the medical records based upon what has been said and whether or not there is any causation evidence in the record right now that his current complaints are related to the herniated disc and if those herniated discs are associated with this accident when the medical reports from the date of the accident and thereafter indicate that he made no complaints with his neck and shows that his neck was supple and without tenderness or any complaints.

Judge Avery: Well, I'll, I'll take that under consideration. I'm - - I'll look at the evidence as it is now.

Ms. Fisher: Okay. You don't need his report then that's fine.

¹ There was a "fax transmittal" dated August 23, 2004 to Judge Avery by Jan L. Fisher enclosing the August 20, 2004 report of Dr. Holmes and was stamped "filed" August 23, 2004.

² Respondent and Insurance Carrier's Brief to the Board in Support of Application for Review at 10 and 11 (filed Sept. 20, 2004).

Judge Avery: Well, I'll take it under consideration as to whether I need the report or not.

Ms. Fisher: Okay.

Judge Avery: I haven't looked at the - - I have kind of glanced over the records.

Ms. Fisher: I don't mean to be difficult. If I get the report today should I submit it to you and Mr. Anderson or would that be fine?³

The transcript does not show that Judge Avery made any response to this last question from claimant's counsel. Instead, there was an interruption and the discussion never got back to the question of supplementing the record with the expected report from Dr. Holmes. After claimant's counsel sent the transmittal letter and report to the court, Judge Avery did not enter an order concerning its admissibility nor otherwise rule on respondent's objection. Furthermore, the Order for Compensation that Judge Avery entered on August 24, 2004, makes no mention of the report. Accordingly, it is impossible for the Board to know whether or not Judge Avery considered the report in making his determination. Under these circumstances and given respondent's objection, the Board will not consider Dr. Holmes' August 20, 2004 letter. It is not part of the record on appeal.

The record shows that the court took some stipulations at the preliminary hearing. Claimant's brief to the Board states that respondent stipulated that claimant suffered personal injury by accident arising out of and in the course of his employment. "At the time of the [p]reliminary [h]earing, Mr. Anderson [sic] admitted personal injury by accident arising out of and in the course of employment. Since that stipulation was entered into, it certainly is not appealable."⁴ The record reflects, however, that respondent admitted there was an accident but denied claimant was injured as a result of that accident.

Judge Avery: Respondent admits the claimant met with personal injury by accident on that date. Respondent denies the accidental injury arose out of his employment. Respondent admits timely notice, relationship of employer/employee, coverage by the act and timely written claimant [sic]. Respondent is also denying causation for the temporary total.

Mr. Andersen: Just so we're absolutely clear, Your Honor, you said I admitted personal injury and I deny that he had any personal injury related to this accident. I don't dispute that the motor vehicle accident occurred, but rather, he had a personal injury arising from that is the question.

Judge Avery: You're saying he wasn't injured at all?

³ P.H. Trans. at 34 and 35.

⁴ Claimant's Brief to Appeals Board at 5 (filed Sept. 27, 2004).

Mr. Andersen: Right.⁵

. . . .

Judge Avery: Okay. So you're denying personal injury by accident as well?

Mr. Andersen: Right.⁶

As the above quoted discussion between court and counsel clearly shows, whether claimant suffered personal injury by accident arising out of and in the course of his employment remains an issue. The only stipulation is that the April 1, 2004 accident, where the bus claimant was driving left the road and fell over on its side, arose out of and in the course of claimant's employment with respondent. Whether claimant suffered personal injury as a result of that accident is disputed.

ISSUES

As stated above, the issue is whether claimant sustained personal injury as a result of his April 1, 2004 work-related accident. Respondent disputes that claimant's neck injury arose out of his employment and further disputes that claimant's temporary disability is a result of the work-related accident.

Conversely, claimant contends that the ALJ's finding that "claimant aggravated a pre-existing condition in his neck as a result of his 4/1/04 accident. . . and that "[h]e is off of work in part because of his need to take pain medication "⁷ for the neck condition, should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record compiled to date, the Board finds that the ALJ's Order for Compensation should be affirmed.

On April 1, 2004, claimant was working for respondent as a school bus driver. While operating a school bus, claimant either fell asleep or otherwise momentarily lost consciousness. As a result, the school bus left the road and landed on its side. Claimant alleges he injured his head, neck and upper back as a result of falling approximately eight (8) feet from his drivers seat to the other side of the bus after he unfastened his seatbelt. Although there is substantial evidence that the accident was likely a result of a personal

⁵ P.H. Trans. at 5.

⁶ P.H. Trans. at 6.

⁷ Order for Compensation (Aug. 24, 2004).

condition, specifically a blockage in claimant's carotid artery, any neck injuries resulting from the accident would nonetheless be compensable.⁸ Treatment for the occluded carotid artery, however, would not be compensable.⁹

Respondent denies that claimant's neck was injured in the accident. Claimant had a preexisting degenerative neck condition that had been aggravated in a 2002 automobile accident. Claimant received epidural steroid injections in his cervical spine following that prior accident and had treated for his neck condition as recently as January 2003. Furthermore, respondent points out that claimant denied having any symptoms in his head, neck or upper back following the accident and during the two week period thereafter when he was being examined and treated by various physicians. Respondent points out that the first documented report of claimant mentioning any neck symptoms appears in the April 14, 2004 office notes of Dr. Holmes. This was the day after the claimant's neck surgery for his occluded carotid artery and, therefore, was likely a sequela of that procedure according to respondent.

However, Dr. Holmes' notes mention an onset of neck symptoms that predates the surgery.

The patient reports that since his recent dismal [sic], over the last several days, he has increased numbness and tingling at the base of the head involving the posterior aspect of the neck extending down to about the level of T2 or T3, and extending outward from the midline left and right, approximately 4 or 5 inches. He also has tingling that extends out over the back part of the shoulders, and describes a feeling [of] numbness that goes down his right arm and involves his thumb, second finger, and third finger. Previously, this has been an area of pain and tingling, but now seems to [be] more of a numbness sensation. . . .¹⁰

Furthermore, claimant testified that his neck symptoms began shortly after the accident.

Q. (Ms. Fisher) Now, you told us that you'd had some previous problems with your neck and arm, what problems did you have with your neck and arm immediately after the accident?

A. (Mr. Hanrahan) None that I can recall. I just, I just had numbness in the back.

Q. Okay.

⁸ See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973); *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

⁹ K.S.A. 44-501(e).

¹⁰ P.H. Trans. Cl. Ex. 4.

A. The back of my head was numb, my neck was numb and halfway down the back was all numb.

Q. Was that a new symptom for you?

A. Yes, ma'am.

. . . .

Q. Now, did the symptoms in your neck - - you said you had this numbness, did that stay or did it change?

A. It changed.

Q. And how did it change?

A. When the numbness went away then the pain started.

Q. And what pain or problems did you have?

A. Well, I had pain in the, in the lower head, pain in the neck, the pain in the back and on the arms.¹¹

The Board agrees with the ALJ's conclusion that the trauma sustained in the bus accident, particularly to the spine and musculature of claimant's upper back and neck, more probably than not aggravated claimant's preexisting neck condition. Accordingly, treatment for the cervical and upper back condition is compensable.¹²

Finally, respondent argues that even if claimant was injured in the bus accident, claimant is not entitled to temporary total disability (TTD) compensation because of his inability to return to work is a direct result of his carotid artery condition. First, the Board will point out that it does not have jurisdiction to review the ALJ's determination that claimant meets the definition of being temporarily and totally disabled.¹³ The ALJ found claimant was entitled to TTD compensation because he is taking narcotic pain medication. That medication disqualifies him from operating a school bus under the terms of his commercial driver's license. However, it is also true that claimant was instructed by at least two (2) physicians that he could not operate a motor vehicle for at least six (6) months as

¹¹ P.H. Trans. at 14 and 15.

¹² See *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

¹³ See K.S.A. 44-534a and K.S.A. 44-551.

a result of his carotid artery condition. The question presented then is whether claimant is entitled to TTD compensation where his inability to return to work is a result of both a personal condition and a work-related condition, separately and not in combination. The Board finds that this issue is not jurisdictional. The pain medications claimant is taking are for the work-related injury and disqualify him from operating a school bus. Accordingly, the ALJ did not exceed his jurisdiction by entering an award of TTD compensation.

WHEREFORE, the Appeals Board affirms the August 24, 2004 Order for Compensation.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and Ks Assoc. of School Boards
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director